

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION**

ELLIS E. SMITH

PLAINTIFF

VS.

CIVIL ACTION NO. 2:06cv13-KS-MTP

LLOYD BEASLEY, *et al.*

DEFENDANTS

REPORT AND RECOMMENDATION

THIS MATTER is before the court *sua sponte* upon notice of the Suggestion of Death Upon the Record [23] filed by defendants on February 20, 2008. Based on the court record and the applicable law, the undersigned recommends that James Johnson be dismissed from this action.

Plaintiff Ellis E. Smith filed his Complaint [1] on January 19, 2006, naming James Johnson as one of the defendants. On February 20, 2008, defendants filed a Suggestion of Death of James Johnson [23] upon the record. According to the Certificate of Death, James Johnson passed away on January 7, 2008. *See* Ex. A [23-2].

Federal Rule of Civil Procedure 25(a)(1) provides in part:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper party. . . . If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

More than ninety days have passed since defendants filed the Suggestion of Death of James Johnson, and the plaintiff has not filed a motion for substitution with the court. Accordingly, defendant James Johnson should be dismissed from this action. *See Ray v. Koester*, 85 Fed. Appx. 983, 984-85 (5th Cir. 2004); *Jacobs v. Stribling*, No. 1:02cv714-JMR, 2007 WL

2156419, at *1-*2 (S.D. Miss. July 24, 2007).

RECOMMENDATION

For the reasons stated herein, the undersigned recommends that defendant James Johnson be dismissed from this action with prejudice.

NOTICE OF RIGHT TO OBJECT

In accordance with the rules and 28 U.S.C. § 636(b)(1), any party within ten days after being served a copy of this recommendation, may serve and file written objections to the recommendations, with a copy to the judge, the magistrate judge and the opposing party. The District Judge at the time may accept, reject or modify in whole or part, the recommendations of the Magistrate Judge, or may receive further evidence or recommit the matter to this court with instructions. The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendations contained within this report and recommendation within ten days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions accepted by the district court to which the party has not objected. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

THIS, the 28th day of July, 2008.

s/ Michael T. Parker

United States Magistrate Judge